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No. 91-1378

In the Supreme Court of the United States

OCTOBER TERM, 1991

HARRY V. MOHNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in refusing to order immunity for a prospective defense witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 949 F.2d 1397.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1991. The petition for a writ of certiorari was filed on February 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of filing false individual income tax returns, in violation of 26 U.S.C. 7206(1), and on three counts of aiding and assisting

in the filing of false corporate tax returns, in violation of 26 U.S.C. 7206(2).

1. In 1966, petitioner began acquiring businesses in the "adult entertainment" industry, such as theaters, bookstores, peep machines, and novelty and film distributors, all of which featured sex-oriented entertainment. Pet. App. A3. Petitioner ran the businesses as a sole proprietorship, but organized each aspect of the business as a separate corporation. Pet. App. A2-A3. Petitioner formed Modern Bookkeeping Services (MBS) to handle the bookkeeping and tax preparation aspects of the businesses, and he hired Elizabeth Scribner to manage MBS. Pet. App. A3.

In 1984, federal agents executed a search warrant at MBS headquarters and seized $400,000 in currency and records indicating that petitioner had failed to report income that he skimmed from the peep machines of one of his businesses, International Amusements, Ltd. (IA). Pet. App. A3. Petitioner's technique was to have his "route drivers" collect the proceeds from the peep machines in coin and convert some of those proceeds into paper currency. When the route drivers returned to IA's offices, they deposited the coin proceeds into the bank, but retained the currency. For tax purposes, however, gross income was calculated based on the bank deposits, which did not include the currency. See Gov't C.A. Br. 5-6.

2. Petitioner was charged in a seven-count indictment with conspiring to defraud the United States, in violation of 18 U.S.C. 371, filing false personal income tax returns, in violation of 26 U.S.C. 7206(1), and causing the filing of false corporate tax returns, in violation of 26 U.S.C. 7206(2). Also charged in the conspiracy count were Elizabeth Scribner, the manager of MBS, and two other of petitioner's associates.

Prior to trial, the district court dismissed the conspiracy count. Relying on the Sixth Circuit's decision in *United States* v. *Minarik*, 875 F.2d 1186 (1989), the court held that the indictment impermissibly charged the conspiracy under the "defraud" clause of Section 371, and should have charged the defendants with conspiracy to commit an offense under the "offense" clause of Section 371. Petitioner went to trial alone on the substantive counts, while the government appealed the dismissal of the conspiracy count against petitioner and his co-conspirators.[1]

The government called 52 witnesses during the trial, many of whom, including former MBS employees and route drivers, testified under grants of immunity. Two witnesses directly involved in keeping the books of IA and its predecessor company testified that one of petitioner's associates received a two percent bonus based on the revenue of certain peep machines. A calculation of the bonus revealed that the peep machines produced income that petitioner had not declared. Pet. App. A3-A4.

The government did not call as witnesses any of the co-conspirators charged in the conspiracy count of the indictment, and refused to grant Ms. Scribner immunity. When petitioner attempted to call Ms. Scribner as a witness, she filed an affidavit stating that she would invoke her Fifth Amendment privilege and refuse to testify. Pet. App. A5. The jury convicted petitioner on all counts.

2. The court of appeals affirmed. The court rejected petitioner's argument that he was denied a

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[1] After petitioner's trial, the Sixth Circuit reversed the dismissal of the conspiracy count, holding that the indictment properly charged the defendants with a conspiracy to defraud the United States. *United States* v. *Mohney*, 949 F.2d 899 (1991).

fair trial when the prosecution and the district court declined to immunize Scribner and the two other co-conspirators so that they could testify as defense witnesses. Pet. App. A6-A11.[2] The court held that federal courts do not have the inherent power to immunize defense witnesses. Pet. App. A7. It further held that even if the courts had such power, immunity was not available in this case because the government had a legitimate interest in prosecuting the co-conspirators. Pet. App. A8. The court also held that the prosecutor had not engaged in misconduct that violated petitioner's right to due process and required immunity as a remedy. Pet. App. A9-A11.

ARGUMENT

Petitioner argues (Pet. 6-15) that the district court's refusal to order immunity for Scribner violated the Due Process Clause. Petitioner urges that immunity should have been granted on one of two theories: first, the district court should have granted Scribner immunity because her testimony was essential to an effective defense; second, the district court should have ordered the government to grant statutory immunity to Scribner to prevent the government from deliberately distorting the fact-finding process.

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[2] The court of appeals also rejected petitioner's arguments that the district court (1) erred in denying a motion to suppress evidence seized pursuant to the search warrant (Pet. App. A12-A14); (2) abused its discretion in ruling on the testimony of the summary witnesses (Pet. App. A14-A21); (3) erred in denying a motion for a judgment of acquittal (Pet. App. A21-A24); (4) erred in denying petitioner's motion to dismiss based on a closing agreement with the Internal Revenue Service (Pet. App. A24-A26); and (5) erred in refusing to permit cross-examination concerning the closing agreement (Pet. App. A26-A27). Petitioner does not pursue any of those issues in his petition.

A district court does not have authority to immunize a witness absent a request from the government. The federal immunity statute, 18 U.S.C. 6001 *et seq.*, vests the power to seek immunity in the Executive Branch. In discussing the immunity statutes, this Court has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983); see also *United States* v. *Doe*, 465 U.S. 605, 616-617 (1984). Not surprisingly, the great majority of the courts of appeals, like the court below, have held that judges may not immunize defense witnesses without a request from the prosecution.[3]

Petitioner's claim (Pet. 9-12) that the decision in this case conflicts with a decision of the Third Circuit is mistaken. The Third Circuit has held that

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[3] See, *e.g.*, *United States* v. *Hooks*, 848 F.2d 785, 803 (7th Cir. 1988); *Mattheson* v. *King*, 751 F.2d 1432, 1443 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986); *United States* v. *Pennell*, 737 F.2d 521, 527 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *Autry* v. *Estelle*, 706 F.2d 1394, 1401-1402 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984); *United States* v. *Heffington*, 682 F.2d 1075, 1080-1081 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1975), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Alessio*, 528 F.2d 1079, 1080-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); see also *United States* v. *Capozzi*, 883 F.2d 608, 613 (8th Cir. 1989), cert. denied, 495 U.S. 918 (1990); *United States* v. *Eagle Hawk*, 815 F.2d 1213, 1217 (8th Cir. 1987), cert. denied, 484 U.S. 1012 (1988).

immunity may be granted on the court's initiative when it is necessary to protect the defendant's efforts to mount a defense. *Government of Virgin Islands* v. *Smith*, 615 F.2d 964 (1980). The Third Circuit has not had occasion since this Court's decisions in *Doe* and *Conboy* to reconsider its ruling in *Smith*, and the continued vitality of that decision is thus uncertain. But even assuming *Smith* retains vitality, petitioner would not be entitled to immunity for Scribner under the *Smith* approach.

The Third Circuit narrowly limited the scope of its rule:

> [I]mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity.

Smith, 615 F.2d at 972.[4] In this case, there was a strong countervailing governmental interest. As the court of appeals explained, Pet. App. A8-A9, "[t]he government here indicted * * * Scribner * * * along with [petitioner]" and had a legitimate interest in

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[4] The Third Circuit in *Smith* made clear that the trial court should not grant immunity where "the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses." 615 F.2d at 972. Petitioner asserts that "Scribner's testimony would have been exculpatory." Pet. 13. However, when petitioner specifically recounts the purposes for which Scribner was to have been called, see Pet. 4, it appears that her testimony would have been largely cumulative and not clearly exculpatory, and thus would not have met the *Smith* criteria in any event.

prosecuting her.[5] Compelled judicial use immunity could have impaired her subsequent prosecution. Pet. App. A7; see also *United States* v. *Pennell*, 737 F.2d 521, 529 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Thevis*, 665 F.2d 616, 640 (5th Cir.), cert. denied, 459 U.S. 825 (1982). Thus, the court of appeals correctly held that, even if this case had arisen in the Third Circuit and been decided under the standards articulated in *Smith*, petitioner would not have prevailed. Cf. *United States* v. *Lowell*, 649 F.2d 950, 965 (3d Cir. 1981) (upholding denial of defense witness immunity in part because government "may yet" prosecute witness for whom immunity was sought).

Petitioner's second theory is also unavailing. Statutory immunity for Scribner was not required in order to prevent deliberate distortion of the fact-finding process. The courts that have addressed that theory have held that district courts may compel the government to immunize defense witnesses in only two circumstances: where government intimidation provokes a defense witness into invoking his Fifth Amendment privilege, thereby withholding testimony that otherwise would have been available to the defense, or where the government withholds immunity from a defense witness for the sole purpose of keeping exculpatory evidence from the jury. See, *e.g.*, *United States* v. *Pinto*, 850 F.2d 927, 932 (2d Cir.), cert. denied, 488 U.S. 867 (1988); *United States* v.

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[5] As the court of appeals also noted, Pet. App. A8-A9, while the district court dismissed the conspiracy charge naming Scribner, the dismissal was subject to a motion to reconsider throughout the trial and was reversed on appeal. Moreover, even if the appeal had been unsuccessful, the prosecution could have pursued charges against Scribner for conspiracy to file false returns. Pet. App. A9.

Hooks, 848 F.2d 785, 799 (7th Cir. 1988); *United States* v. *Lord*, 711 F.2d 887, 891 (9th Cir. 1983).

Petitioner does not argue that prosecutorial misconduct caused Scribner to assert her Fifth Amendment privilege and withhold testimony that otherwise would have been available to him. See *United States* v. *Angiulo*, 897 F.2d 1169, 1192 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990). He merely asserts (Pet. 12) that it was unfair for the prosecution to grant immunity to its own witnesses while refusing to grant immunity to Scribner. Petitioner claims (Pet. 12-14) that the government refused to grant Scribner immunity for the purpose of distorting the fact-finding process.

There is no basis for petitioner's claim that the prosecution declined to grant Scribner immunity for the purpose of keeping exculpatory testimony from the jury. As previously discussed, the government provided valid reasons for its objection to immunizing Scribner—her indictment as a co-conspirator with petitioner and the desire not to hinder her prosecution for the very same conduct with which petitioner was charged. Moreover, petitioner did not have the right to have Scribner immunized simply because the prosecution had immunized witnesses in its case against him. *United States* v. *Hooks*, 848 F.2d at 802; *United States* v. *Chagra*, 669 F.2d 241, 259 (5th Cir.), cert. denied, 459 U.S. 846 (1982); *United States* v. *Turkish*, 623 F.2d at 774-775. As the Fifth Circuit noted in *Chagra*, 669 F.2d at 259,

> the balance between the government's interest in prosecuting accused felons and the accused's interest in presenting exculpatory and otherwise unobtainable evidence should not be inflexibly resolved by the fortuity that the government grants immunity to a particular witness in a

> particular case. If the government's prosecutorial interest outweighs a defendant's interest in presenting such evidence * * * then the government's interest also outweighs any abstract concern with symmetry.

In light of the government's strong interest in prosecuting Scribner, the government's refusal to immunize Scribner did not violate petitioner's right to due process.[6]

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[6] Petitioner repeatedly asserts that the "prosecution *affirmed* to the court and the defense that it intended to immunize [Scribner] and call her as a witness," and that "[t]he prosecution's stated intention to grant Scribner immunity and call her as a witness was relied upon by [petitioner]." Pet. 5. See also Pet. 12, 14. Those assertions are mistaken. As the district court explained, the government had to include all possible witnesses on its witness list because "[the prosecutors] have to tell the jury who the witness may be and find out whether or not anybody knows them." The district court added that "if [the government] didn't put her name on the list and then made a determination a week before the end of trial they were going to call her in rebuttal and give her use immunity they wouldn't have been able to do it because she wasn't on the list." 4/6/89 Tr. 54-55. At sentencing, the district court repeated its finding that "[t]here was never any promise to call Ms. Scribner," and that "[b]ecause the government never 'promised' [petitioner], the court or the jury that it would call or immunize Elizabeth Scribner, [petitioner's] claim that he relied upon such promise to his detriment is meritless." 5/1/89 Tr. 52-53.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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